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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No.

BOHUN B. KINLOCH, JR.

*Petitioner,*

vs.

THE NEWS AND OBSERVER PUBLISHING COMPANY

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Bohun B. Kinloch, Jr., respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment affirming the judgment of the United States District Court for the Eastern District of North Carolina in favor of Respondent.

## CITATIONS TO OPINIONS BELOW

The District Court's opinion is reported at 314 F.Supp. 602 (E.D.N.C. 1969), and is attached as Appendix B. The District Court's Order granting Respondent's motion for summary judgment is also reported at 314 F.Supp. 602, and attached as Appendix A. The opinion of the Court of Appeals for the Fourth Circuit is reported at 427 F.2d

350 (4th Cir. 1970), and is attached as Appendix C. The Order of the Court of Appeals denying Petitioner's Petition for Rehearing is unreported, and is attached as Appendix D.

## JURISDICTION

The Judgment of the Court of Appeals was entered on June 8, 1970 (Appendix C). A timely Petition for Rehearing was filed, and was denied by order of January 20, 1971 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States, the Seventh Amendment to the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, and Rule 56 of the Federal Rules of Civil Procedure are attached as Appendix E.

## QUESTIONS PRESENTED

1. Is a private citizen, who is neither a public official nor a public figure, barred by the doctrine of *New York Times Co. v. Sullivan,* 376 U.S. 254, and subsequent decisions, from recovering damages for defamatory falsehood unless he proves "actual malice" by the standards of those decisions, where (a) he has done nothing to thrust himself into the "vortex" of matters of "public interest," (b) the defamatory publication is a report of news which is not "hot," but is over two months old, and (c) the publisher knows of the existence of, but fails to consult, authoritative sources which demonstrate the falsity of the matter published?

2. May a federal trial court, within the limitations imposed by the Seventh Amendment upon the summary

judgment procedures authorized by Federal Rule of Civil Procedure 56, and within the limitations of that Rule itself, dispose, in a defamation case, on conflicting evidence, of questions of (a) qualified privilege and (b) actual malice, thereby determining for itself what inferences are to be drawn from the evidence?

## STATEMENT

This case presents—on facts which raise the point about as squarely as it is ever likely to be raised—the question, still unsettled by this Court, of whether the doctrine of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and its progeny, abolishes for all practical purposes the common law of defamation, in virtually every conceivable fact situation, where the defendant is a newspaper or other branch of the mass media.

The falsity of the published matter complained of having been conceded by the Respondent's failure to plead truth as a defense, the facts must be examined in that light.

The Petitioner, Kinloch, of unquestioned good character and reputation, was a candidate for the Ph.D. degree at North Carolina State University, simultaneously owning and running a discotheque, or nightclub, known as The Scene. He was no public figure, nor was his establishment well known; the president of the defendant corporation, whose business was news, had "never heard of" Kinloch, its City Editor knew nothing "good or bad" about Kinloch's establishment, and the reporter who wrote the article which Kinloch complains of had no knowledge, until the day before the article appeared, that Kinloch's establishment was the subject of the quasi-judicial proceedings hereinafter mentioned, although those proceedings had been pending for several months, it was his job to cover such matters, and most of the events he eventually reported had occurred two and one-half months before his article appeared. In early 1967,

the North Carolina Board of Alcoholic Control charged the establishment with derelictions of a rather routine nature at places where beer is sold: allowing three intoxicated persons, each on a different date, to loiter and consume beer on the premises, permitting an affray and disorderly conduct on one occasion and disorderly conduct on another, failure to give the premises proper supervision on each of these occasions, and no longer being suitable to hold a beer permit. On May 30, 1967, a hearing examiner of the Board heard these charges, making a nearly (but, because of defects in the recording equipment, not entirely) verbatim recording of the testimony. Nine witnesses (Mr. and Mrs. Kinloch, three employees, and four patrons) testified favorably to the establishment, in person or by affidavit, and seven (three law enforcement officers, three neighbors of the establishment, and a man who worked next door) unfavorably. The hearing examiner, apparently (judging by the cross-examination reported in the transcript) elicited from an officer some testimony as to complaints about marihuana and pep-type pills. (The initial such testimony was apparently on direct examination by the hearing officer, at a point where the recorded testimony was inaudible.) On cross-examination, recorded and transcribed verbatim, the witness said that the nature of the complaints was:

> "We had information that a person that was at The Scene, which was a frequent visitor and which the times we had gone to The Scene we had seen this person there, was selling marihuana."

The Respondent's newspaper wrote nothing about, and none of its reporters were present at, the May 30 hearing. Two and one-half months later, on August 14, the newspaper did cover an appellate hearing, where The Scene was heard by the full Board of Alcoholic Control on appeal from the examiner's recommendation that its beer license be revoked. At that hearing, the examiner read his findings, Kinloch's counsel made argument based on detailed references to the verbatim transcript, which was by that time was available,

and Kinloch made a statement. The Respondent's reporter was present and paying attention to everything which transpired. Some members of the Board commented favorably to the establishment. The Board adopted the examiner's findings as its own, reduced the revocation to a thirty-day suspension, and, as did the examiner, found The Scene guilty of fewer than half the charges leveled against it (there having been a second evidentiary hearing on certain additional and similar charges): allowing two named individuals to loiter on the premises on two dates, two to loiter and consume beer on other dates, and failure, by permitting these offenses, properly to supervise the premises on the same dates.

The following day, the Respondent's newspaper ran its article on the back page. (The article is included in Appendix B.) Based on the hearing examiner's summary, which the reporter on deposition testified he knew to be a resume or summary of testimony actually given on another occasion, the article treated at length the subject of marihuana. It stated that the establishment had "been described by the Raleigh police as a place where narcotics are used," and placed in quotation marks, and ascribed to the testifying officer, two statements which were actually taken word for word from the hearing examiner's *summary* of what he had said, stating:

> (1) That the officer "had testified before an ABC hearing officer that he 'has frequently seen an individual generally reported and believed to be a dealer in marihuana at The Scene.' "

> (2) " 'There have been complaints as to the possession and use of narcotics at The Scene, he said.' "

The officer later testified on deposition, giving "Yes" or "No" answers to leading questions stating these words, that he had actually used these words in his testimony on

May 30. Kinloch filed an affidavit to the effect that he had not. The verbatim transcript contains nothing in the language of the second statement ascribed by the hearing examiner to the witness, although various language in it does indicate that the witness had said something about complaints about marihuana and pep-type pills, place and circumstances unspecified.

The article mentioned the testimony of none of The Scene's witnesses other than Kinloch himself, reported none of the cross-examination of the adverse witnesses (with a possible exception of a reference to cross on the subject of marihuana and narcotics), did not state what the establishment was charged with, what it was convicted of, or that it was acquitted on the majority of the charges. In selecting his material, the reporter used, in his own words, "that which is interesting, informative, unusual."

Kinloch immediately notified the Respondent that the article was false and defamatory of him, demanding retraction, correction and the opportunity to confer with Respondent. A few hours after receipt of this demand, and after consulting nothing other than the materials the reporter had already consulted (which did not include the verbatim transcript which had been available at the time he wrote his article) Respondent decided not to comply with Kinloch's demands and instructed its attorney to convey that decision to Kinloch's attorney.

Kinloch sued for libel *per se* on grounds that the article imputed to him a violation of the narcotics laws of North Carolina and unfitness to operate his business. On depositions, affidavits and other evidence, the District Court rendered summary judgment for defendant (Appendix A, B). In all candor, it must be said that the extent to which the District Court relied upon the authority of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and related cases, does not appear with ideal clarity from the District Court's

opinion; it does, however, appear that the District Court felt it necessary to rely upon this doctrine in order effectively to dispose of Kinloch's contention that, regardless of whether the article was full, fair, complete and accurate (and therefore qualifiedly privileged), there was sufficient evidence of common law malice to take the case to the jury. It is of course hornbook defamation law—in North Carolina and elsewhere—that evidence of "actual malice" as defined by the common law will take the case to the jury even in the face of an established qualified privilege; therefore, the District Court's disposition of the "actual malice" issue, on the authority of *New York Times,* appears to have been an essential ingredient in its disposition of the cause.

## REASONS FOR GRANTING THE WRIT

As of the time when this petition is being prepared, there exist at least three major reasons for granting the writ; each is a strong reason in its own right, and their simultaneous existence would seem to indicate that this petition comes at one of those relatively rare points in time when both theoretical and practical interest in a relatively new doctrine of law have reached unusual proportions. These three reasons are:

1. This case involves a conflict among the Circuits which has existed for several years and involves considerably more than two Circuits.

2. There is pending on the docket of this Court a case which was argued several months ago, the decision of which in favor of the petitioner in that case would clearly demonstrate the error of the District Court's decision in this case (although a contrary disposition of that case would not necessarily demonstrate the correctness of the District Court's disposition of this case).

3. The District Court's disposition of this case by summary judgment, when viewed in connection with a grow-

ing tendency among the District Courts to dispose of, and among the Courts of Appeals to approve the disposition of, defamation cases in such fashion, raises serious questions as to the proper scope to be given Federal Rule of Civil Procedure 56 when it is measured against the Seventh Amendment right to jury trial and the purpose of the Rule itself.

A. *Until the conflict among the Circuits is resolved, the District Courts and the Courts of Appeals will continue to be occupied with a large volume of defamation litigation, often involving repeated appeals before the merits are reached.*

The question presented by the case at bar is simply whether a person who is the epitome of the private individual, and who has not thrust himself into the "vortex" of public life, can recover punitive damages for defamation resulting from a very careless reporting of very stale news, which carelessness nonetheless concededly does not approach the extreme measure of recklessness required by *New York Times*. There is not much hyperbole, then, in saying that the question posed by this case is whether the teaching of *New York Times* abolishes the common law of defamation as it has hitherto existed in the states, or stops at some line short of that abolition.

This question, over the past several years, has caused an uncommon amount of trouble in the lower federal courts. No purpose would be served by a detailed listing of all of the decisions which have speculated as to what this Court considers the law to be. A few examples will demonstrate the scope of the problem. For instance, it has been settled in the District of Columbia Circuit, since 1966, that *New York Times* does not deprive a person in Petitioner's position of his traditional remedies:

> "We conclude that New York Times, as written and likely to be extended, does not and will not preclude recovery, even in the absence of malice, by a man whose

> role is as non-public as the plaintiff's, by a man who has not mounted a public rostrum, made an appeal to the public, sought or received public funds, offered a service or product for public use or comment, or organized a boycott or other group activities by members of the public." *(Afro-American Pub. Co. v. Jaffe,* 366 F. 2d 649, 658 (D.C. Cir. 1966).

Decisions in at least three other Circuits, although on facts differing from case to case and differing from this case, nonetheless read *New York Times* in a totally different manner, and do so, as did the District Court in the case at bar, on one fundamental ground: the notion that almost anything which a publisher or broadcaster conceives it to be worth his while to print or broadcast thereby becomes a matter of "public interest," and is automatically entitled to the virtually total protection afforded by the doctrine of *New York Times.* Examples of this view may be seen in *Rosenbloom v. Metromedia, Inc.,* 415 F. 2d 892 (3rd Cir. 1969), *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F. 2d 857 (5th Cir. 1970), and *United Medical Laboratories, Inc. v. Columbia Broadcasting Systems, Inc.,* 404 F. 2d 706 (9th Cir. 1968).

All of these cases rest upon the best judgment of the particular court as to the scope of the doctrine first enunciated by this Court, some seven years ago, in *New York Times.*

It seems clear, beyond question, that this Court has not directly settled the issue one way or another. The Courts of Appeals assume that this is so. The latest decisions of this Court in defamation cases indicate that it is so. For example, in *Monitor Patriot Co. v. Roy,* 39 U.S.L.Wk. 4264, 4266 (decided February 24, 1971), this Court said:

> "Later cases have made it clear that the applicability of this basic approach [that of *New York Times*] is not limited to those in public office or to the performance of official acts, or, for that matter, to conventional libel suits."

Even in "public official" cases, such as, for example, *Time, Inc. v. Pape,* 39 U.S.L.Wk. 4270 (decided February 24, 1971), this Court has made it clear that a publisher's serious inaccuracies as to the source of his information—inaccuracies of the type existing in the case at bar—do not foreclose a right of action:

> "Our decision today is based on the specific facts of this case, involving as they do a news report of a particular government publication that purported to describe the specific grounds for perceiving in 1961 'a serious problem in the United States.' " (39 U.S.L.Wk. 4272)

In sum, the Petitioner in the case at bar, Kinloch, was the essence of the private man. Being a candidate for the Ph.D. degree is a sure ticket to obscurity, and one of the Respondent's officials, whose business was news, testified on deposition that he had "never heard of him." The question becomes whether Kinloch's opening an establishment where beer was sold and entertainment provided could fairly be characterized as his having thrust himself into the "vortex" of public life and concern. This seems unlikely under circumstances which involve the reporting of news more than ten weeks old, when the news consisted of the report of a judicial proceeding based upon facts which had occurred months before that, and when, in addition, the major thrust of the article was based upon serious misquotations, from a secondary source, as to statements which were at best collateral to the scope of the proceeding reported. If *New York Times* abolishes the law of defamation across the board, the case at bar would be an ideal one in which to say so; if it does not, the case at bar affords an excellent opportunity to draw the line.

B. *If Rosenbloom v. Metromedia, Inc., No. 66 on the present docket of this Court, which was argued in December, 1970, is decided favorably to the petitioner, it would follow automatically that the Petitioner in the case at bar has been*

*subjected to an erroneous ruling; conversely, a contrary ruling in Rosenbloom would not necessarily be fatal to Petitioner in the case at bar, because Rosenbloom is a far stronger case for the application of the doctrine of New York Times.*

Petitioner's contentions in this regard can be stated succinctly. This Court has heard argument in *Rosenbloom,* in which it granted certiorari to the Third Circuit to review the opinion contained in 415 F. 2d 892. Rosenbloom, on evidence of common law malice certainly no stronger than that in the case at bar, lost his case in the Third Circuit because of the opinion of the Court of Appeals that the defendant was protected by the ramifications of *New York Times.* The case was disposed of in the Third Circuit on what was basically the "public interest" doctrine fashioned by the lower courts. The factors unfavorable to Rosenbloom, however, were far weightier than those unfavorable to Kinloch in the case at bar. Rosenbloom was a distributor of nudist magazines in the Philadelphia area, an occupation certainly more flamboyant than that of a discotheque owner in the provincial capital of North Carolina. In Philadelphia, there had been considerable outcry and public complaint about obscene literature and, most important, Rosenbloom had brought an action against police officials to enjoin them from certain conduct affecting his business. Finally, the news was "hot," and not ten weeks old as was the news in the case at bar. Further, no such impeccable source as a verbatim transcript, available in the case at bar, was at the disposition of the broadcaster in *Rosenbloom.* It would thus seem to follow that reversal in *Rosenbloom* would indicate, beyond reasonable argument, that the decisions of the lower courts in the case at bar were wrong, and might well warrant summary reversal. On the other hand, this Court may decide *Rosenbloom* in such manner as to draw a line which does not necessarily encompass Kinloch, in which event decision of the case at bar would serve further to clarify the location of the line.

C. *The disposition of this case via summary judgment*

***under Federal Rule of Civil Procedure 56, both as to the issues of qualified privilege and malice, raises a serious question, as to which there appears to be considerable difference of opinion among the Circuits, as to the procedural appropriateness, and the constitutional validity, of utilizing that extraordinary device in an area of law where the importance of inferences from the evidence is capital.***

The District Court held as a matter of law that the article in question was full, fair, complete and accurate, the result of which was a holding that it was qualifiedly privileged as a matter of law. The holding is a curious one in light of the facts that (1) the article presented the proceeding as one wherein Kinloch had testified alone against an array of unfavorable witnesses, when in actuality the number of favorable witnesses had outweighed those who were hostile to him; (2) the article never mentioned the actual, and banal, charges against the establishment and the fact that it was acquitted on many of them; (3) the article reported none of the cross-examination of unfavorable witnesses and (4) the article did not state that the establishment was neither charged with, nor found guilty of, harboring narcotics or their purveyors, even though that subject was the heart of the article. This result, however wrong and however discouraging to counsel for Petitioner, is of course not, in and of itself, the stuff of which successful petitions for certiorari can be composed. It was, however, contrary to what appeared to be established law in the Fourth Circuit, *Hubbard v. Associated Press,* 123 F. 2d 864, 867 (4th Cir. 1941), *Vaughan v. News Leader Co.,* 105 F. 2d 360 (4th Cir. 1939).

It is basic defamation law that "actual malice" (in the common law sense) will nonetheless take the case to the jury regardless of whether a qualified, as distinguished from an absolute, privilege exists. On this score, the opinion of the District Court, affirmed by the Fourth Circuit, is in conflict with the views of another Circuit. *Goldwater v. Ginzburg,*

414 F. 2d 324 (2nd Cir. 1969), in which certiorari was denied by this Court (____ U.S. ____, 1970), affirmed a District Court judgment refusing, even in the case of a public figure, to sanction summary judgment where issues of actual malice were crucial (261 F. Supp. 784, 788 (S.D.N.Y. 1966):

> "The issue of actual malice on the part of defendant seems peculiarly inappropriate for dispositions by summary judgment because it concerns 'motive, intent, and subjective feelings and reactions.' "

The Fifth Circuit, *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F. 2d 857 (5th Cir. 1970), has arrayed itself with the Fourth Circuit to the contrary, creating, again, a split involving more than two of the circuits.

The District Court's disposition of the malice question without the intervention of a jury was directly contrary to the controlling state law, which holds that malice or bad motive "must be determined by the jury from all the facts and circumstances, if there is any evidence of the same," *Riley v. Stone,* 174 N.C. 588, 94 S.E. 434, 439 (1917), and that it may be proved directly or indirectly, and by legitimate inferences to be drawn from the evidence, *Ferrell v. Siegle,* 195 N.C. 102, 141 S.E. 474, 476 (1928).

## CONCLUSION

This petition is prepared at a time when, judging by the Court's docket for the current term, it raises questions in an area in which the Court is going to some length to settle the many uncertainties which characterize the present state of the law. The case presents a rather unusual agglomerate of reasons, each a traditionally valid reason in itself, for granting the writ. Needless to say, the economy of time and money which will be realized by the lower courts, litigants, and the public, if this Court delineates the impact

of *New York Times* upon a private individual who has been minding his own business until thrust unwillingly into the public eye, will be considerable. If this Court reverses in *Rosenbloom,* Petitioner will have been put out of court without a jury trial on the basis of an incorrect guess by the lower courts as to what this Court would have held in his situation. If *Rosenbloom* is affirmed, decision of the case at bar by this Court will serve the very useful purpose of further locating the line, for the additional factors in *Rosenbloom* mean that it is not a case in which the conceivable outside limits of *New York Times* can be sketched, by way of square holding. Finally, and independently of these considerations, the profession and the lower courts are greatly in need of definitive guidelines as to when summary disposition of defamation cases is appropriate; the recent cases in the field demonstrate that lack of settled guidelines has often resulted in multiple appeals and hearings in the same case, with a heavy penalty in terms of delay and expense. Petitioner is simply an average citizen of good character, and the grief to which he has come because of Respondent's publication is, concededly, relatively routine; the questions of law his case raises are, however, of peculiar timeliness and importance.

Respectfully submitted,

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# APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA

RALEIGH DIVISION

| | | |
|---|---|---|
| BOHUN B. KINLOCH, JR., *Plaintiff* | ) | |
| v. | ) | Civil Action 2160 |
| THE NEWS AND OBSERVER PUBLISHING COMPANY, *Defendant.* | ) | |

FINAL ORDER

Upon consideration of the defendant's motion for summary judgment, and for reasons stated in a memorandum this day filed, it is

ORDERED that said motion for summary judgment be, and the same hereby is, SUSTAINED, and this action is ORDERED DISMISSED with taxable costs assessed against the plaintiff,

To which action of the Court the plaintiff excepts.

/s/ WALTER E. HOFFMAN
United States District Judge
(Under Designation)

At Norfolk, Virginia
June 3, 1969

# APPENDIX B

## JUDGE HOFFMAN'S MEMORANDUM ACCOMPANYING FINAL ORDER OF JUNE 3, 1969

This action for libel stands on the defendant's motion for summary judgment. Finding that there is no material dispute on any genuine issue of fact, the motion must be sustained for the reasons herein stated.

The plaintiff was a graduate student at North Carolina State University and, at the same time, was the sole stockholder of a corporation known as The Scene, Ltd., which corporation operated a discotheque-type night club in Raleigh, North Carolina. As a result of various Alcoholic Control Board violations over a period of time at The Scene, together with complaints from neighbors, a citation containing six charges was issued and directed to The Scene and, on May 30, 1967, a hearing was conducted before an Alcoholic Control Board hearing examiner.

At approximately the same time the night club closed for the summer months due to the loss of student business from the State University. We do not reach the issue of special damage, if any, and whether an alleged libelous statement relative to The Scene is actionable by this plaintiff.

Apparently no newspaper reporter attended the hearing on May 30, 1967. In due time the hearing examiner filed his report and, on August 14, 1967, a review of the hearing examiner's report was fully argued by the plaintiff-permittee and his attorney before the full Alcoholic Control Board.

On the following day, August 15, 1967, the following story appeared in the defendant's newspaper:

# "RALEIGH NIGHT SPOT LOSES BEER PERMIT FOR 30 DAYS

"By Jim Lewis

"The Scene, Ltd., a Raleigh night spot that features go-go girls and has been described by Raleigh police as a place where narcotics are used, lost its permit Monday to sell beer for 30 days.

"The State Board of Alcoholic Control ordered the temporary suspension of The Scene's beer permit which was issued about a year ago to Bohun Baker Kinloch, Jr., a 32-year-old doctoral candidate in genetics at N. C. State University.

"ABC officers recommended revocation of the beer permit held by the owner of the night spot at 4 Faircloth St., near the intersection of Hillsborough Street and Clark Avenue.

"Detective Edwin D. Whitley of the Raleigh Police Department had testified before an ABC hearing officer that he 'has frequently seen an individual generally reported and believed to be a dealer in marijuana at The Scene.'

" 'There have been complaints as to the possession and use of narcotics at The Scene,' he said.

"Kinloch denied the allegations made by the police officer and testified that he had no knowledge of either the use or possession of narcotics at his establishment.

"The detective's testimony came to light Monday when the State ABC Board reviewed The Scene's appeal to lift a revocation of its beer permit.

"ABC officers had testified that there were cases of

affrays, loitering, disorderly, drunken and boisterous conduct and that loud noises often emanated from the night spot. Neighbors often complained about traffic created by The Scene's clientele.

"Det. St. Alvin A. Bunn of the Raleigh Police Department testified that 'certain young females who wear very brief costumes and dance on an elevated stand' are featured at The Scene.

"Det. Whitley said that some waitresses at the establishment have been charged with larceny and two go-go dancers have court records. Det. Bunn described the night spot's reputation in the neighborhood as 'poor.'

"ABC officers also contended that The Scene does not qualify for a beer license because it sells only beer and gives away peanuts.

"State law provides that an establishment must sell soft drinks, food or other items for public consumption before it is eligible to receive a license to sell beer.

"Kinloch, who was represented by Raleigh attorney John V. Hunter, Jr., told the ABC board that he considered the recommendation to revoke his beer permit 'a gross breach of justice' because his wife and he had operated 'a decent and respectable business since we started' in March of 1966.

"The Scene has been temporarily closed for business and personal reasons since June 1, Kinloch told the board.

"He said that he 'can't afford to have my reputation damaged.' He explained that he expected to receive a PhD. degree from N. C. State in December. The Charleston, S. C., native earned degrees from the University of Virginia and N. C. State.

"He said that The Scene represents an investment of about $16,000 and the ABC board would be performing a 'gross miscarriage of justice' if the business lost its beer license indefinitely."

Plaintiff contends that the words published were untrue, false and defamatory. Additionally, it is said that certain words are false in that they were not uttered by the persons to whom they are attributed.(1)

The parties agree that the article was based upon what the reporter heard at the hearing on August 14, 1967, and his reading of the hearing examiner's report entitled "Findings of Fact and Recommendations." While there was a transcript of the hearing on May 30 before the examiner, it is admitted that the reporter did not have the same before him when the article was written.

The defendant, in its motion for summary judgment, argues that (1) the published article was qualifiedly privileged as a report of public governmental proceedings and records, and (2) the published words are not *per se* libelous "of and concerning the plaintiff," and are not actionable in the absence of a showing of special damages and malice.

One of the problems involved here is that the news report specifically states that certain statements were made by police and ABC officers regarding The Scene, but the faulty equipment used to record the verbatim testimony of witnesses at the evidentiary hearing on May 30 left substantial gaps in the verbatim transcript. The hearing ex-

(1) The article states that The Scene "has been described by Raleigh police as a place where narcotics are used." Detective Whitley had said that he had "frequently seen an individual generally reported and believed to be a dealer in marijuana at The Scene."

Further complaint is made with respect to that portion of the news article which recites "ABC officers had testified that there were cases of affrays, loitering, disorderly, drunken and boisterous conduct and that loud noises emanated from the night spot." It is contended that the falsity lies in reference to testimony by "ABC officers" with respect to "affrays," "disorderly," and "boisterous conduct."

aminer, Assistant Director A. E. Leake, filed his official report in which he summarized the testimony. When we examine the hearing examiner's "Findings of Fact and Recommendations" together with such portions of the testimony which were capable of being transcribed, it reflects substantially the same information and testimony as was reported in the controversial news article.

As to the possession and use of narcotics at The Scene, the record discloses a letter from R. E. Goodwin, Captain of Detectives, to Ray Brady, Chairman of the ABC Board, stating in part "we have had several reports that marijuana and other pep type pills might be distributed at this club." On cross-examination of Detective Whitley there appears in the transcript (pp. 24-26) of the May 30 hearing: "We had information that a person that was at The Scene, which was a frequent visitor and which the times we had gone to the Scene we had seen this person there, was selling marijuana." Thereafter, Detective Whitley testified that, on one occasion, the police had taken action.(2)

When the report of the hearing examiner was filed, it disclosed Whitley's testimony as follows: " . . . that there have been complaints as to the possession and use of narcotics at The Scene." When asked in his deposition as to what Whitley said, the hearing examiner testified: "Detective Whitley on direct examination gave some testimony with reference to some individual who was reported — and I believe he used the language 'generally known' — to be a pedler (sic) of some form of narcotics, or marijuana I believe, as hanging out around there a good deal."

While there is a technical difference in wording, we think that the article fairly places in the proper prospectus the

(2) Detective Whitley, on cross-examination, was asked and responded as follows:

"Q. You stated I believe that you had had some complaints about marijuana and pep-type pills?

"A. Yes, sir, that is correct."

testimony given at the May 30 hearing. Under the authorities hereinafter cited, this is all that is required in the absence of actual malice, even though the statement may be false and defamatory.

Turning to the alleged libelous statements regarding ABC officers reporting instances of affrays, disorderly and boisterous conduct, we find evidence of same in the transcript of the May 30 hearing from Detective Whitley (tr. pp. 16, 17, 19), Detective Bunn (tr. pp. 28-29), ABC officer Wiggins (tr. pp. 35-39, 42-43), and other witnesses who were neither police nor ABC officers but who corroborated their testimony. It is, in our opinion, of no consequence that the published article attributed these statements to ABC officers when, with the exception of ABC officer Wiggins, they were made by police officers.

Plaintiff has filed a counter-affidavit stating that "Mr. Whitley did not state at the hearing that he had 'frequently seen an individual generally reported and believed to be a dealer in marijuana at The Scene,' and did not state at the hearing that 'there have been complaints as to the possession and use of narcotics at The Scene.'" The counter-affidavit goes further and states, "At no time in any hearing before the North Carolina ABC Board involving The Scene, Ltd. did any ABC officers testify that there had been cases of affrays, or of disorderly or boisterous conduct."

Despite this counter-affidavit, we are of the opinion that, where a hearing examiner files an official report such as the "Findings of Fact and Recommendations" as here found—all done in a quasi-judicial capacity—a newspaper reporter may rely upon that report as being substantially accurate under the doctrine of conditional or qualified privilege. It is not material that the reporter failed to preface his statement to the effect that the hearing examiner "found" that a certain individual testified in a particular manner.

This is especially true where, as here, the verbatim transcript lends support to the examiner's findings, and the quoted police officer has said that the news article "contains a substantially accurate and correct report of [his] testimony before the Hearing Officer, A. E. Leake, on May 30, 1967." Leake testified by deposition to the same effect. Such depositions may properly be considered on a motion for summary judgment. *Pilkenton v. Kingsport Publishing Corp.*, 270 F.Supp. 315 (W.D.Va., 1967), aff'd 395 F. (2d) 989 (4 Cir., 1968). The mere fact that plaintiff's counter-affidavit denies that Whitley made the statements attributed to him in the exact words as they appeared in the article does not alter the fact that the report was *substantially* accurate.

There is no merit to the argument that the published article was not fair and complete. It covered the pertinent bases of the examiner's recommendation and plaintiff's statement to the full Board at the August 14 hearing. The transcript of the May 30 hearing consumes 121 pages and the examiner's report is a single-spaced, typewritten document consisting of 21 pages. It was never contemplated that any newspaper could publish more than the highlights of any administrative or judicial proceeding. In the context of this action for libel, there is no room for dispute as to whether this article was reasonably fair and complete.

Plaintiff argues that there is evidence of malice which destroys the conditional privilege. It is said:

> " . . . that the publication complained of treating three separate hearings as if they were one, quoting the Hearing Examnier's findings as direct quotations from the testimony of witnesses, alluding to testimony neither given by witnesses nor said by the hearing officer to have been given by them, eliminating all testimony on cross-examination of witnesses unfavorable to the plaintiff, and eliminating all evidence

favorable to the plaintiff other than portions of his own statement at the hearing before the full ABC Board—was not only unprivileged, but was made with actual malice . . . "

There is no suggestion of personal ill-will. Without agreeing that counsel's contention is factually correct, the holding that the article is substantially accurate, fair and complete negatives an inference of malice which might conceivably be drawn from the factors urged by plaintiff's counsel. Mere failure to retract a story which is substantially accurate, fair and complete cannot be regarded as evidence of malice.

*New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), dealt with publications concerning public officials. *A fortiori,* there is a public interest in having free access to knowledge of public activity. The First Amendment imposes limitations upon malice. We think it clear that no issue of malice could be submitted to a jury in this case. *Cf. New York Times v. Connor,* 365 F. (2d) 567, 577 (5 Cir., 1966).

It is quite true that issues such as those raised herein are ordinarily for the jury but, where there is no substantial issue of fact, summary judgment is appropriate. *Piracci v. Hearst Corp.,* 263 F. Supp. 511 (D. C. Md., 1966); *Pilkenton v. Kingsport Publishing Corp.,* supra.

The law of North Carolina, which controls this case, is equally clear. Publication of matters of public interest is conditionally privileged if fair, accurate, complete and not published for the purpose of harming the person involved, even though the information contained therein is false. *Galtis v. Kilgo,* 140 N.C. 106, 52 S.E. 249 (1905); *Herndon v. Melton,* 249 N.C. 217, 105 S.E. (2d) 531 (1938). The plaintiff is required to show that the defendant used the privileged occasion artifully and knowingly

to falsely defame the plaintiff. *Ramsey v. Cheek,* 109 N.C. 270, 13 S.E. 775 (1891); *Ponder v. Cobb,* 257 N.C. 281, 126 S.E. (2d) 67, 78 (1962).

While perhaps inapposite to the facts of this case, it is said that the defense of privilege in defamation cases rests upon the idea that conduct which otherwise would be actionable is an avoidance of liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of an uncompensated harm to the plaintiff's reputation. *Alexander v. Vann,* 180 N.C. 187, 104 S.E. 360 (1920); *Prosser, Torts,* 796 (3 Ed., 1964).

The law does not require absolute accuracy in reporting. It does impose the word "substantial" on the accuracy, fairness and completeness. It is sufficient if it conveys to the persons who read it a substantially correct account of the proceedings. *Restatement, Torts,* section 611, comment (d). We believe that there can be no dispute as to the admitted facts in this case.

There are alternative grounds asserted by defendant in its motion for summary judgment which we deem it unnecessary to consider in light of the holding above.

/s/ WALTER E. HOFFMAN
United States District Judge
(Under Designation)

At Norfolk, Virginia
June 3, 1969

# APPENDIX C

## UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

---

No. 13,804

---

BOHUN B. KINLOCH, JR.

*Appellant*

VS.

NEWS AND OBSERVER PUBLISHING COMPANY

*Appellee*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH

WALTER E. HOFFMAN, CHIEF DISTRICT JUDGE
EASTERN DISTRICT OF VIRGINIA
SITTING BY DESIGNATION

---

(Argued April 9, 1970. Decided June 8, 1970.)

---

Before BOREMAN, WINTER and BUTZNER, Circuit Judges.

---

John V. Hunter III, for Appellant, and William C. Lassiter (James H. Walker on Brief) for Appellee.

---

PER CURIAM:

Bohun B. Kinloch, Jr., instituted this diversity action for defamation in which he sought to recover damages claimed to have resulted from an allegedly libelous and defamatory newspaper article published in defendant's newspaper. The article pertained to charges brought by the North Carolina State Board of Alcoholic Control against "The Scene, Ltd.," a discotheque-type nightclub owned and operated by Kinloch.

Upon reports of alleged violations of pertinent laws and regulations and upon complaints from persons living near the club, a citation was issued by the Board and on May 30, 1967, a hearing of the charges was conducted before the Board's hearing examiner.

The hearing examiner filed his report in due course but it appears that no newspaper reporter was present at the May 30 hearing. Subsequently, on August 14, 1967, a review of the hearing examiner's report was fully argued by Kinloch and his attorney before the full ABC Board. The allegedly libelous newspaper article, which the parties agree was based upon the reporter's reading of the hearing examiner's report of the May 30 hearing and the reporter's observations at the August 14 hearing, appeared in the defendant's newspaper the following day.

The district court granted the defendant's motion for summary judgment holding that there was "no material dispute on any genuine issues of fact." The court found that the newspaper reporter was justified, under the doctrine of conditional or qualified privilege, in relying upon the hearing examiner's report as being substantially accurate, that said report was substantially accurate, and that the published newspaper article was substantially accurate, fair and complete.

Upon consideration of the record, briefs and oral argument we find no reversible error.

*Affirmed.*

# APPENDIX D

## UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13,804

BOHUN B. KINLOCH, JR.

*Appellant*

vs.

NEWS AND OBSERVER PUBLISHING COMPANY

*Appellee*

## ORDER DENYING REHEARING

Appellant filed a petition for rehearing with a suggestion of rehearing en banc. No member of the court having requested a vote on the suggestion for rehearing en banc pursuant to Fed.R.App.P. Rule No. 35(b), and upon consideration by the panel,

NOW, THEREFORE, with the concurrence and approval of Judge Winter and Judge Butzner, it is

ORDERED that the petition be and the same hereby is denied.

/s/ HERBERT S. BOREMAN
United States Circuit Judge

Filed January 20, 1971
Samuel W. Phillips
Clerk

A True Copy, Teste:
Samuel W. Phillips, Clerk
By Virginia Lipford, Deputy Clerk

# APPENDIX E

## CONSTITUTION OF THE UNITED STATES

* * *

### AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * *

### AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

* * *

### AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

## FEDERAL RULES OF CIVIL PROCEDURE

* * *

## Rule 56.
## SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a mater of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It

shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented

in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1602

BOHUN B. KINLOCH, JR.

*Petitioner,*

vs.

THE NEWS AND OBSERVER PUBLISHING COMPANY

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## BRIEF FOR RESPONDENT IN OPPOSITION

### QUESTIONS PRESENTED

The Respondent takes exception to both questions set forth in the Petition (p. 2).

Neither question has relevance in the context of the decisions of the Courts below. The attempt of the Petitioner to state a question with federal implications or of national importance is not supported by the decisions of the Courts below.

This *diversity action* for defamation involves a newspaper report of a current proceeding before the North Carolina State Board of Alcoholic Control. (Petition, Appendix C,

p. 12A). While Respondent pleaded (a) qualified privilege under North Carolina law and (b) federal constitutional privilege "to publish reports of matters of government and public concern," the District Court rendered Summary Judgment dismissing the action upon "[T]he law of North Carolina, which controls this case, . . . ." (Petition, Appendix B, p. 9A, last paragraph) The District Court held that there was no material dispute on any genuine issue of fact (Petition, Appendix B, pp. 2A, 10A). The Court of Appeals affirmed, Per Curiam (Petition, Appendix C, p. 12A); rehearing denied (Petition, Appendix D, p. 13A).

No constitutional issue under the Seventh Amendment attacking Rule 56, Federal Rules of Civil Procedure (Petition, Appendix E, pp. 14A-17A) or its application, has been presented by Petitioner in either of the Courts below.

## STATEMENT

The Petitioner's Statement contains certain inaccuracies, omits certain material facts, and is argumentative.

The Statement in the Petition fails to show that the basis for federal jurisdiction in the District Court was DIVERSITY, as required by Rule 23, para. 1 (g).

The statement of the case by the District Court in its Memorandum (Petition, Appendix B, pp. 2A-10A) is accurate. The statement of the Court of Appeals, Per Curiam decision, is accurate (Petition, Appendix C, p. 12A).

This diversity action is based upon alleged libelous matter in Respondent's newspaper report of proceedings before the North Carolina State Board of Alcoholic Control (hereafter ABC Board).

The newspaper article (Petition, Appendix B, pp. 3A-5A) was published on August 15, 1967 and was a current report of a hearing on August 14, 1967 (Petition, p. 2A) before

the ABC Board. The article included matters of testimony at a May 30, 1967 hearing before an ABC Board Hearing Officer, summarized in the "Findings of Fact and Recommendations" made by the Hearing Officer (Petition, Appendix B, pp. 3A-5A). That testimony related to conduct of patrons at a Raleigh nightclub owned and operated by The Scene, Ltd., a North Carolina corporation, which is not a party to this action. The stock of that corporation was owned solely by the plaintiff, who was its President. The ABC Board, on August 14, 1967, suspended the beer permit previously issued to The Scene, Ltd., and that fact was reported in the newspaper article.

At the August 14, 1967 hearing before the ABC Board, the "Findings of Fact and Recommendation" of the Hearing Officer were before the Board. The Board "approved the findings of fact as its own and made a decision thereon." There was no appeal from that decision. In writing the news article in question, the Respondent's reporter relied upon those findings of fact which summarized the testimony of the witnesses.

The District Court held that "[W]hen we examine the hearing examiner's 'Findings of Fact and Recommendations' together with such portions of the testimony which were capable of being transcribed, it reflects substantially the same information and testimony as was reported in the controversial news article." (Petition, Appendix B, p. 6A)

The District Court held that there was "no material dispute on any genuine issue of fact" (Petition, p. 2A), that the article was "substantially accurate" and "reasonably fair and complete" (Petition, p. 8A), and that there was "no issue of malice [which] could be submitted to a jury in this case." (Petition, p. 9A)

The Respondent has not alleged, nor did either Court below make a determination, that the plaintiff was a public official or a public figure.

The Respondent pleaded two affirmative defenses—(a) qualified privilege to report a quasi-judicial proceeding under North Carolina law and (b) a constitutional privilege (under the First and Fourteenth Amendments to the Constitution of the United States) "to publish reports of matters of government and public concern, including the said proceedings and records before the North Carolina Board of Alcoholic Control against The Scene, Ltd."

The District Court rendered its Summary Judgment dismissing the action upon "[T]he law of North Carolina, which controls this case, . . . ." (Petition, Appendix B, p. 9A, last paragraph). Respondent still contends that the Federal constitutional privilege is a valid defense, but decision below was rendered upon the rule of qualified privilege established by the law of North Carolina.

## SUMMARY OF ARGUMENT

The Respondent opposes the Petition for Writ of Certiorari for the reasons summarized as follows and hereinafter more fully presented:

1. The questions in the Petition are conclusory, based upon unfounded assumptions, and include issues not raised in nor decided by the Courts below.

2. The decisions of the Courts below were rendered in a diversity action and were controlled by and based upon the law of the State of North Carolina, and, therefore, do not present questions of national importance.

3. Contrary to contentions of the Petitioner, there is no "split among the Circuits" upon issues decided by the Courts below, which involved only the question of qualified privilege to report quasi-judicial proceedings and records and the question of actual malice, even if Federal constitutional considerations entered into the decisions.

4. Any "split among the Circuits" as to the propriety of summary judgment procedure for disposing of libel actions is in the form of a proper and legitimate refusal to approve a Summary Judgment dismissing a libel action when there is a genuine issue of material fact as to the existence of actual malice, as opposed to the approval of summary dismissal of libel actions when no genuine issue of material fact is shown.

5. Contrary to the contention of the Petitioner, there is no issue as to the constitutionality of the Summary Judgment Rule 56, Federal Rules of Civil Procedure, under the Seventh Amendment, because (a) no such issue was raised in either of the Courts below, and (b) such issue is not validly raised under the facts of the present case, since there was no genuine issue of material fact for submission to a jury.

6. Contrary to contentions of the Petitioner, there was no failure of the Courts below to make an accurate statement or application of the law of North Carolina; the dismissal of this action by Summary Judgment, in the absence of a genuine issue of material fact as to the qualified privilege or as to actual malice, is in accord with North Carolina Supreme Court decisions and is sanctioned also by a Summary Judgment Rule in the North Carolina Rules of Civil Procedure containing substantially *verbatim* the provisions of Rule 56, Federal Rules of Civil Procedure.

7. Contrary to the contentions of the Petitioner concerning the potential effect upon the case at bar of a decision of this Court in *Rosenbloom v. Metromedia, Inc.*, (No. 66, Present Docket), it appears to the Respondent that a decision by this Court in *Rosenbloom* will probably not have such significance upon any issue decided by the Courts below so as to require granting certiorari herein by reason of the fact that *Rosenbloom* remains

undecided. Respondent contends that a decision affirming the Court of Appeals in *Rosenbloom* would probably provide an additional ground for sustaining the Summary Judgment in the case at bar; but a reversal in *Rosenbloom* would probably not have any material effect upon any issue decided by the Courts below in the pending case.

## ARGUMENT

### I.

### THE DECISIONS OF THE COURTS BELOW WERE BASED UPON STATE LAW IN A DIVERSITY ACTION. THUS, THERE IS NO ISSUE OF NATIONAL SIGNIFICANCE OR IMPORTANCE.

The District Court rendered Summary Judgment for the Respondent, dismissing the action, upon "[T]he law of North Carolina, which controls this case, . . ." (Petition, p. 9A)

The Petition (p. 6) concedes with candor that "the extent to which the District Court relies upon the authority of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and related cases, does not appear with ideal clarity from the District Court's opinion; . . . ."

The District Court accurately stated and applied the rule of qualified or conditional privilege established by the Supreme Court of North Carolina (Petition, pp. 9A-10A). That rule is that the publication of a fair and accurate report of public proceedings and records before a public board is privileged although the report contains defamatory matter. *Gattis v. Kilgo,* 140 N.C. 106, 52 S.E. 249 (1905), 128 N.C. 402, 38 S.E. 931, 932 (1901); *Herndon v. Melton,* 249 N.C. 217, 105 S.E. 2d 531 (1958); see also *Prosser on Torts* (2d Ed.) p. 623; *Restatement of Torts,* § 611, comment (d).

The Petition does not challenge the District Court's state-

ment that the law of North Carolina "controls this case." Nor does the Petition take exception to the District Court's statement of the law of North Carolina on the subject of qualified privilege of reporting a quasi-judicial proceeding as a matter of public interest or on the subject of actual malice. [Petitioner does contend (p. 13) that the District Court's "disposition of the malice question without the intervention of a jury was directly contrary to the controlling state law, . . . ." This contention is not supported by the law of North Carolina. This point is considered later in this Brief at pages 17-18.]

The Court of Appeals in affirming, Per Curiam, the judgment of the District Court, stated that the District Court has "found that the newspaper reporter was justified, under the doctrine of conditional or qualified privilege, in relying upon the hearing examiner's report as being substantially accurate, that said report was substantially accurate, and that the published newspaper article was substantially accurate, fair and complete." (Petition, Appendix C, p. 12A)

The Petition contains no suggestion that the Court of Appeals misapplied the law of North Carolina.

Neither question in the Petition (pp. 2-3)—either in its statement or as a subsidiary question fairly comprised therein—presents an issue that State law was misstated or misapplied. Thus, that issue will not be considered by this Court. (Rule 23 (1) (c).)

The decisions of the Courts below fail to present any issue of national significance or importance or of federal implications.

## II.

## IF THE COURTS BELOW RENDERED THEIR DECISIONS UPON FEDERAL CONSTITUTIONAL CON-

SIDERATIONS, THERE IS NO BASIS FOR PETITIONER'S CONTENTION THAT "THIS CASE INVOLVES A CONFLICT AMONG THE CIRCUITS" WITH RESPECT TO ANY ISSUE RAISED OR DECIDED IN EITHER OF THE COURTS BELOW.

The Petitioner asserts that he is "a person who is the epitome of the private individual, and who has not thrust himself into the 'vortex' of public life, . . ." (Petition, p. 8.) The Petition (p. 3) asserts that the Petitioner "was no public figure." The implication is that the Courts below in rendering decisions against the Petitioner treated him as a "public figure" and applied the constitutional doctrines enunciated by the Supreme Court in *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S. Ct. 710 (1964) and related cases.

The Respondent has not in any pleading or brief or argument alleged or contended that the Petitioner is a public official or a public figure.

The issue of law before the District Court and the Court of Appeals was whether the Respondent's newspaper report of the proceedings and records of the State ABC Board was substantially accurate, fair and complete and whether the publication was made with actual malice.

If the District Court and Court of Appeals based their decisions upon Federal Constitutional considerations, there is, nevertheless, no basis for the Petitioner's contention that "this case involves a conflict among the Circuits" with respect to any issue raised or decided in either of the Courts below.

The Petitioner cites only four decisions in support of his contention that there is "a conflict among the Circuits": *Afro-American Pub. Co. v. Jaffe,* 366 F. 2d 649, 658 (D. C. Cir., 1966); *Rosenbloom v. Metromedia, Inc.,* 415 F. 2d 892 (3rd Cir., 1969), *Bon Air Hotel, Inc. v. Time,* 426 F. 2d

858 (5th Cir., 1970), and *United Medical Laboratories, Inc. v. Columbia Broadcasting Systems, Inc.*, 404 F. 2d 706 (9th Cir., 1968)—(Petition, p. 9).

None of those cases involved an issue of Federal constitutional privilege (or State law privilege) to report judicial or quasi-judicial proceedings or records.

At most, those cases cited by the Petitioner involved the question of whether the first amendment protection, extended to public officials in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), and to public figures in *Curtis Publishing Company v. Butts*, 388 U.S. 130, 87 S. Ct. 1975 (1967) and *Greenbelt Cooperative Publishing Association v. Bressler*, 398 U.S. 6, 90 S. Ct. 1537 (1970) applies to publications concerning "matters of public interest."

The Petitioner cites no decision of a United States Court of Appeals (or of any other court) which has failed to apply the rule of qualified or conditional privilege to a publication of a report of judicial or quasi-judicial proceedings or records.

The Federal Courts have recognized and applied the rule of qualified privilege to fair and substantially accurate reports of judicial and similar public proceedings, denying liability in the absence of actual malice. *Sellers v. Time, Inc.*, 299 F. Supp. 582, 584-585 (D.C., E.D., Pa., 1969), affirmed 423 F. 2d 887 (3 Cir., 1970), cert. den., ___ U.S. ___, 91 S. Ct. 61 (Oct. 12, 1970); *Hurley v. Northwest Publications, Inc.*, 398 F. 2d 346 (8 Cir., 1968); *Phillips v. Murchison*, 252 F. Supp. 513 (D.C., S.D., N.Y., 1966), affirmed as to counts involving report of judicial proceeding, 383 F. 2d 370, 372 (2 Cir., 1967), cert. den., 390 U.S. 958, 88 S. Ct. 1050 (1968); *American District Telegraph Company v. Brinks, Incorporated*, 380 F. 2d 131 (7 Cir., 1967); *Fletcher v. Evening Star Newspaper Co.*, 114 F. 2d 582 (D.C. App., 1940), cert. den., 312 U.S. 694, 61 S. Ct. 732 (1941); *Cresson v. Louisville Courier-Journal*, 299 F. 487 (6 Cir., 1924);

*Conklin v. Augusta Chronicle Pub. Co.*, 276 F. 288 (5 Cir., 1921).

If the Courts below rendered their decisions upon Federal Constitutional considerations, it is respectfully submitted that such decisions are adequately supported under the decision of this Court in *Time, Incorporated v. Pape,* __ U.S. __, 91 S. Ct. 633, 39 U.S. Law Week 4270 (decided February 24, 1971), although the plaintiff in that case was admittedly a public official. There are similarities in the facts of the Pape Case and of the present case. The libel action was based upon alleged defamatory matter in a magazine news report which summarized a Report of the United States Commission on Civil Rights, containing a summary of a complaint against the libel action plaintiff in a civil rights case. The dismissal of the libel action was affirmed, notwithstanding the fact that Time Magazine quoted from the Commission's summary of the civil rights complaint against Pape, without indicating that the charges against Pape were allegations of the complaint and not independent findings of the Commission.

It is respectfully submitted that there is no conflict between the decisions of the Courts below in the present case and the decisions of any other Court of Appeals nor decisions of the Supreme Court upon the facts and the issues involved in the case at bar.

(With respect to a contention in the Petition (pp. 12-13) that there is a "split involving more than two of the circuits" as to the "procedural appropriateness" of dismissing a libel action by Summary Judgment, the Respondent's response to this contention is set forth at pages 14-17 of this Brief, in opposing the contentions made in subdivision "C" of the Petition (pp. 11-13).)

## III.

## EVEN IF THE SUPREME COURT SHOULD REVERSE THE DECISION OF THE COURT OF AP-

PEALS IN ROSENBLOOM v. METROMEDIA, INC. (No. 66, PRESENT DOCKET), SUCH A DECISION WOULD NOT SUPPORT THE PETITION FOR CERTIORARI HEREIN.

The Petition (pp. 10-11) asserts that if *Rosenbloom v. Metromedia, Inc.*, 415 F. 2d 892 (3 Cir., 1969) reversing 289 F. Supp. 737 (D.C., E.D., Pa., 1968); certiorari granted, 397 U.S. 904, 90 S. Ct. 917 (1970), No. 66, present docket, is decided favorably to Rosenbloom, "it would follow automatically that the Petitioner in the case at bar has been subjected to an erroneous ruling" and that "a contrary ruling in *Rosenbloom* would not necessarily be fatal to Petitioner in the case at bar, . . . ."

In undertaking to predict the effect of a decision before its rendition, counsel for the Petitioner has entered a realm of considerable conjecture. While such predictions are of doubtful value, counsel for the Respondent is impelled under these circumstances to submit counter observations.

The Petition (p. 11) concedes that *Rosenbloom* was disposed of by the Court of Appeals on the "public interest" doctrine. That seems clear from the Court's opinion, 415 F. 2d 892. There is nothing in that opinion to indicate that the case was disposed of by applying the rule of qualified privilege to report judicial or quasi-judicial proceedings. Although the *second* series of radio broadcasts complained of by Rosenbloom in his libel action dealt in part with a report of a judicial action, the *first* set of broadcasts related to a series of police raids on alleged distributors and sellers of obscene matter. The broadcasts referred to "smut and/or girlie-books" and contained unjustified implications concerning Rosenbloom, according to the Court of Appeals. (415 F. 2d, 894.) The defendant pleaded truth as a defense (289 F. Supp., 745). While not entirely clear from the reported decisions, it appears that Metromedia, Inc., pleaded qualified privilege to report the judicial action covered in the second series of broad-

casts. However, the District Court indicated that the defendant's conduct in "the two different sets of broadcasts" was treated "as one ball of wax." (289 F. Supp., 747.) There was no ruling by the District Court or by the Court of Appeals that the radio broadcasts were protected by any rule of qualified privilege to report such proceedings. Thus, in that respect, there is a material and significant difference between the issues involved in *Rosenbloom* and the issue involved in the case at bar.

It seems to follow that if the Supreme Court should decide that the Court of Appeals committed error in holding that the defamatory radio broadcasts in *Rosenbloom* were entitled to constitutional protection as "matters of public interest" under an extension of the *New York Times-Sullivan* doctrine, such decision would have no application to or effect upon the decisions of the Courts below that the Respondent was not liable to the Petitioner because of the rule of qualified privilege to report a quasi-judicial proceeding and because the newspaper report was substantially accurate, fair and complete and was published without actual malice.

On the other hand, if the Supreme Court should affirm the decision of the Court of Appeals in *Rosenbloom,* it would appear that in addition to its defense of qualified privilege to report a quasi-judicial proceeding, the Respondent here would be entitled to a dismissal of this libel action on the constitutional ground that the subject matter of the newspaper article was "a matter of public interest."

The suggestion in the Petition (p. 11) that the news broadcast in *Rosenbloom* was "hot" and "not ten weeks old as was the news in the case at bar" is not supported in fact. The newspaper article here was published on August 15, 1967, reporting the State ABC Board hearing held on August 14, 1967. The article reported testimony taken at a May 30, 1967 hearing and summarized in Findings of Fact which were before the ABC Board at the August 14, 1967 hearing (Peti-

tion, Appendix B, pp. 2A, 5A, 6A). Furthermore, the District Court held that the transcript of the testimony taken at the hearing and the summary of that testimony in the Hearing Officer's Findings of Fact reflected "substantially the same information and testimony as was reported in the controversial news article." (Petition, Appendix B, p. 6A)

It is respectfully submitted that a decision by the Supreme Court in *Rosenbloom* will probably not have such significance upon any issue decided by the Courts below in the pending case as to require the granting of a writ of certiorari herein by reason of the fact that *Rosenbloom* remains undecided by this Court.

## IV.

## THE ATTEMPT OF THE PETITIONER TO RAISE INITIALLY IN THIS COURT AN ISSUE AS TO THE CONSTITUTIONAL VALIDITY OF THE SUMMARY JUDGMENT RULE AND ITS APPLICATION TO DISPOSE OF THIS CASE COMES TOO LATE; NEVERTHELESS, THE RULE IS CONSTITUTIONAL, AND THE DISMISSAL OF THE ACTION BY SUMMARY JUDGMENT, IN THE ABSENCE OF A GENUINE ISSUE AS TO ANY MATERIAL FACT, WAS PROPER AND AFFORDS NO VALID SUPPORT FOR THE PETITION FOR CERTIORARI.

The Petitioner contends that the District Court's disposition of this action by summary judgment raises serious questions as to the proper scope to be given Rule 56, Federal Rules of Civil Procedure when it is measured against the Seventh Amendment right to jury trial and the purpose of the Rule itself. (Petition, pp. 7-8.) The Petitioner further asserts that the dismissal of the action by summary judgment raises an issue as to "the procedural appropriateness" and "the constitutional validity" of such "extraordinary device." (Petition, pp. 11-13)

The Petition (Question 2, pp. 2-3; Argument, p. 12) con-

tends that there was conflicting evidence and inferences requiring a jury trial. The Petition's statement of "facts" in support of the argument (p. 12) are not in accord with the facts as stated in the District Court's Memorandum and the determination that there was "no material dispute on any genuine issue of fact." (Petition, Appendix, pp. 2A-10A) Furthermore, the Petition (p. 12) concedes that this is not "the stuff of which successful petitions for certiorari can be composed."

It would seem that an attempt in the Petition to raise for the first time an issue concerning the constitutional validity (under the Seventh Amendment) of the Summary Judgment Rule or its appropriate application for the dismissal of this libel action comes too late. *Adickes v. S. H. Kress and Company,* 398 U.S. 144, 90 S. Ct. 1598, footnote 2 (1970; *Lawn v. United States,* 355 U.S. 339, 362, 78 S. Ct. 311, 324, footnote 16 (1958); *McCulloch v. Kammerer Corporation,* 323 U.S. 327, 328, 65 S. Ct. 297, 298 (1945).

Summary judgment is not a substitute for the trial of disputed, genuine issues of fact. A jury trial is guaranteed only when there are genuine issues of material fact. Therefore, when, as in the case at bar, there is no genuine issue of material fact, a summary judgment does not violate the Seventh Amendment. *Fidelity and Deposit Co. v. United States,* 187 U.S. 315, 23 S. Ct. 120 (1902); *Galloway v. United States,* 319 U.S. 372, 389-395, 63 S. Ct. 1077, 1086-1090 (1943); *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288-290, 88 S. Ct. 1575, 1592-1593 (1968).

The Petitioner cites no authority for his suggestion of constitutional invalidity of summary procedure for the dismissal of libel actions.

The contention that Summary Judgment dismissing this libel action is inappropriate and unconstitutional is without merit. *Washington Post Co. v. Keogh,* 365 F. 2d 965 (D.C.

App., 1966), cert. den., 385 U.S. 1011, 87 S. Ct. 708 (1967); *Thompson v. Evening Star Newspaper Co.*, 394 F. 2d 774 (D.C. App., 1968), cert. den., 393 U.S. 884, 89 S. Ct. 194 (1968); *King v. Hildebrandt*, 331 F. 2d 476 (2 Cir., 1964); *Sellers v. Time, Inc.*, 399 F. Supp. 582 (D.C., E.D., Pa., 1969), affirmed, 423 F. 2d 887 (3 Cir., 1970), cert. den., --- U.S. --- 91 S. Ct. 61, (Oct. 12, 1970); *Piracci v. Hearst Corporation*, 263 F. Supp. 511 (D.C., Md., 1966), affirmed, 371 F. 2d 1016 (4 Cir., 1967, memo); *Pilkenton v. Kingsport Pub. Corp.*, 270 F. Supp. 315 (D.C., W.D., Va., 1967), affirmed, 395 F. 2d 989 (4 Cir., 1968); *Time, Inc. v. McLaney*, 406 F. 2d 565 (5 Cir., 1969), cert. den., 395 U.S. 922, 89 S. Ct. 1776 (1969); *American District Telegraph Company v. Brinks, Inc.*, 380 F. 2d 131 (7 Cir., 1967); *Hurley v. Northwest Publications*, 273 F. Supp. 967 (D.C., Minn., 1967), affirmed, 398 F. 2d 346 (8 Cir., 1968); *United Medical Laboratories v. Columbia Broadcasting System*, 258 F. Supp. 735 (D.C., Or., 1966), affirmed, 404 F. 2d 706 (9 Cir., 1968), cert. den., 394 U.S. 921, 89 S. Ct. 1197 (1969).

It will be observed from the foregoing decisions that summary judgments dismissing libel actions have recently been affirmed by the Court of Appeals for the Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Circuits and for the District of Columbia. This Court denied certiorari in five of the ten cases cited.

The Courts of Appeal of the seven Circuits mentioned above and of the District of Columbia, in appropriate cases like the pending case (where there was no genuine issue of a material fact as to malice or other aspects of the cases), have not hesitated to affirm summary judgments dismissing libel actions.

Notwithstanding two libel cases cited in the Petition (p. 12) decided in 1939 and in 1941 by the Court of Appeals for the Fourth Circuit in which summary judgments were held not to

be appropriate on the facts of those cases, the decisions of the Court of Appeals, Fourth Circuit, in *Piracci, supra* (1967) and in *Pilkenton, supra* (1968), along with the decision in the case at bar, indicate no refusal of that Court to sanction summary judgment in libel cases. See also *Pulverman v. A. S. Abell Co.,* 228 F. 2d 797 (4 Cir., 1956), *Klein v. Belle Alkali Company,* 229 F. 2d 658 (4 Cir., 1956), and *Porter v. Eyster,* 294 F. 2d 613 (4 Cir., 1961), in each of which summary judgment in a libel case was approved.

The Petition (pp. 12-13) cites *Goldwater v. Ginzberg,* 414 F. 2d 324 (2 Cir., 1969), cert. den., 396 U.S. 1049, 90 S. Ct. 701 (1970), in which a motion for summary judgment dismissing an action for libel was denied. The Petitioner, on the basis of that decision, asserts that the Court of Appeals, Second Circuit, refuses "even in the case of a public figure, to sanction summary judgment where issues of actual malice were crucial." (Petition, p. 13) The Petitioner then contends, on the basis of the decision in *Ginzberg* and the decision in *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F. 2d 858 (5 Cir., 1970), that there is "a split involving more than two of the circuits" on the question of whether summary judgment in libel cases is appropriate (Petition, p. 13). It is obvious from an examination of the opinions in *Ginzberg* that the evidence created a genuine issue of material fact as to the existence of actual malice. The Court of Appeals, Second Circuit, has sanctioned summary judgment dismissal of a libel action where no genuine issue of any material fact was presented. *King v. Hildebrandt,* 331 F. 2d 476 (2 Cir., 1964).

Thus, from the foregoing showing, it is respectfully submitted that the Petitioner has failed to demonstrate a "split among the Circuits" in this area of libel litigation. Any "split" has occurred upon the basis of the particular facts of particular cases—summary judgment dismissing the libel action being sanctioned when no genuine issue of any material fact was presented, but being denied when a genuine issue of fact as to actual malice was demonstrated by the plaintiff.

The Courts have held that Summary Judgment procedure is *particularly appropriate* for the disposition of actions for libel. Failure to dismiss a libel action by summary judgment in many cases would offend First Amendment principles because of the chilling effect of such litigation. *Time, Inc. v. McLaney,* 406 F. 2d 565, 566 (5 Cir., 1969), cert. den., 395 U.S. 922, 89 S. Ct. 1776 (1969); *Washington Post Company v. Keogh,* 365 F. 2d 965, 968 (D.C. App., 1966), cert. den., 385 U.S. 1011, 87 S. Ct. 708 (1967); *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F. 2d 858, 864-865 (5 Cir., 1970); *cf. Dombrowski v. Pfister,* 380 U.S. 479, 85 S. Ct. 1116 (1965).

The prolonged litigation involved in *Time, Inc. v. Pape,* --- U.S. ---, 91 S. Ct. 633 (1971) illustrates the chilling effect upon First Amendment principles, as well as the time-consuming and costly experience of *Time, Inc.*

In *Beckley Newspapers Corporation v. Hanks,* 389 U.S. 81, 88 S. Ct. 197 (1967), this Court reversed a judgment for the plaintiff in a libel action, holding in effect that "the granting of a summary judgment would have been proper." *Hanks v. Beckley Newspapers Corporation,* 172 S.E. 2d 816, 818 (W.Va., 1970). The Supreme Court of Appeals of West Virginia affirmed a summary judgment dismissing the action.

Petitioner's contention that "the District Court's disposition of the malice question without the intervention of a jury was directly contrary to the controlling state law" (Petition, p. 13) is unfounded.

Under the law of North Carolina, when there is a genuine issue of material fact as to malice or any other aspect of a libel action, a jury trial is required. *Riley v. Stone,* 174 N.C. 588, 94 S.E. 434 (1917), cited in the Petition (p. 13). However, when there is insufficient evidence of actual malice, the law of North Carolina required a nonsuit or a directed verdict for the defendant under the rules of procedure in effect prior

to the new Rules of Civil Procedure (effective 1 Jan. 1970). *Herndon v. Melton,* 249 N.C. 217, 105 S.E. 2d 531 (1958); *Gattis v. Kilgo,* 128 N.C. 402, 38 S.E. 931 (1901). In *Herndon,* qualified privilege was held to be applicable and a judgment of non-suit proper, because there was "no evidence of express or actual malice." In *Gattis,* the North Carolina Supreme Court quoted with approval the following statement of law (38 S.E. at p. 935):

> ". . . . If the court decides the publication is conditionally privileged, then it is a matter of law for the court to determine whether there is any intrinsic or extrinsic evidence of malice. If the court decides the question in the negative, it directs a nonsuit, or a verdict for the defendant, without reference to the jury."

Under the new Rules of Civil Procedure, North Carolina has a Summary Judgment Rule containing substantially, *verbatim,* the provisions of Rule 56, Federal Rules of Civil Procedure. N. C. Rules of Civil Procedure, General Statutes of North Carolina, § 1A-1, Rule 56 (Effective 1 Jan. 1970) (This Brief, Appendix A).

Furthermore, this Court ordinarily accepts the determination of local law by the Court of Appeals. *Commissioner of Internal Revenue v. Estate of Bosch,* 387 U.S. 456, 462, 87 S. Ct. 1776, 1781 (1967).

The dismissal of the action by the District Court by summary judgment, in the absence of a genuine issue as to any material fact, and the decision of the Court of Appeals affirming that judgment were proper and the use of such summary procedure under the circumstances of this case is not unconstitutional and is not a valid reason for granting certiorari.

## CONCLUSION

For the reasons hereinbefore stated and supported with

ample citations of authority, the Respondent earnestly urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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# APPENDIX A

## GENERAL STATUTES OF NORTH CAROLINA,

## § 1A-1, RULES OF CIVIL PROCEDURE

### Rule 56. Summary judgment

(a) *For claimant.*—A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.*—A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.*—The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) *Case not fully adjudicated on motion.*—If on motion under this rule judgment is not rendered upon the whole

case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established.

(e) *Form of affidavits; further testimony; defense required.*—Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogations, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if apppropriate, shall be entered against him.

(f) *When affidavits are unavailable.*—Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavits made in bad faith.*—Should it appear to the

satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees. (1967, c. 954, s. 1.)—Effective 1 Jan. 1970.